

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001343-MR

DARRELL W. TREADWAY

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 03-CR-00011-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Darrell W. Treadway was convicted of robbery in the first degree and sentenced to ten years' imprisonment. In this proceeding, he alleges ineffective assistance of counsel pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Treadway was indicted upon one count of robbery in the first degree. At trial, the jury returned a verdict of guilty and Treadway was sentenced to 10 years. He appealed from that judgment and sentence and this Court affirmed in *Treadway v. Commonwealth*, 2005 WL 3333427 (Ky. App. 2005) (2004-CA-000272-MR). His motion for discretionary review to the Supreme Court of Kentucky was denied. Treadway then filed a motion in the trial court whereby he sought to vacate the judgment and sentence pursuant to RCr 11.42 on grounds of ineffective assistance of counsel. The trial court denied the motion without an evidentiary hearing. This appeal followed.

Claims of ineffective assistance of counsel are guided by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first requirement is to show that counsel's performance was deficient and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. For the second prong, a party must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* A defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 690. The defendant has the burden to establish that but for counsel's deficient

performance there is a reasonable probability that the jury would have reached a different result. *Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2001).

Treadway brings eight specific issues to our attention. He first alleges that trial counsel failed to investigate and subpoena two witnesses who were material to his case. He argues that his girlfriend should have been called to rebut the Commonwealth's case in chief, yet offers nothing but speculation as to her possible testimony. Similarly, Treadway argues that counsel should have called the victim's friend who provided the police with a partial license plate number of the car used as a get-away vehicle. Again, he provides nothing but speculation regarding what this witness might have contributed. "The mere fact that other witnesses might have been available . . . is not a sufficient ground to prove ineffective assistance of counsel." *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Treadway next argues that counsel failed to challenge the competency of the Commonwealth's chief witness. However, the record reveals that counsel did elicit a series of admissions from the witness involving psychiatric treatment, intoxication and drug use. A witness is competent to testify if he/she is able to accurately perceive the matter which is the subject of the testimony, can recall the facts, can express himself/herself intelligibly and can understand the need for the truth. *Jarvis v. Commonwealth*, 960 S.W.2d 466 (Ky. 1998). The trial court is in a unique position to observe a witness and determine competency to testify. *Kotas*

v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978). Although the witness in this case may have been intoxicated on the day of the robbery, there is nothing of record to establish his inability to testify at trial

Next, Treadway asserts that the Commonwealth threatened the chief witness with reinstating charges if he failed to testify; that the jury was not admonished after the Commonwealth's closing argument; and that counsel indicated there would be an objection if the Commonwealth attempted to introduce a document indicating Treadway would be eligible for parole after serving 20 percent of his sentence. Counsel apparently believed the jury would be misled or swayed into thinking that Treadway would serve only 20 percent of any sentence it recommended.

None of these claims of ineffective assistance of counsel were presented to the trial court in Treadway's original motion for relief pursuant to RCr 11.42. "The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). RCr 11.42 was not designed to allow a defendant to present one series of arguments to the trial court and new arguments to a reviewing court. *Henson v. Commonwealth*, 20 S.W.3d 466, 471 (Ky. 1999). As these claims were not presented to the trial court, they are not preserved for our review, and we do not reach their merits.

Treadway also argues that the Commonwealth failed to prove beyond a reasonable doubt that he struck the victim, that he took property owned by another, and he argues that it was error to allow the jury to convict him of the theft of unidentified property. All of these direct appeal claims of error were presented on direct appeal and decided contrary to Treadway's interests. A motion for relief pursuant to RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Finally, we address Treadway's argument that he was entitled to an evidentiary hearing on his motion. An evidentiary hearing "is required only if there is a material issue of fact that cannot be conclusively resolved by an examination of the trial court record." *Hodge v. Commonwealth*, 116 S.W.3d 463, 469-70 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Our review is limited "to whether the motion on its face states grounds that are not conclusively refuted by the record and which if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). Here, the trial court properly found no need to examine the allegations beyond the record before it. There was no error in the trial court's failure to conduct an evidentiary hearing.

The judgment of the Lincoln Circuit Court is affirmed.

ALL CONCUR.

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